NO. (1)

84-1040

IN THE

Supreme Court, U.S.
FILED
DEC 27 1984
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

SUCCESSION OF ALBERT JOSEPH CAZALAS

On Appeal from the Supreme Court
of the State of Louisiana

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether an action for reduction filed by a forced heir that is never heard or ruled on by the district court prior to the death of the forced heir is a strictly personal action which abates in accordance with the provisions of Louisiana Code of Civil Procedure Article 428.

2. Whether Louisiana Civil Code Article 1494, providing for forced heirship for parents when their children predecease them leaving no descendents is unconstitutional because it denies equal protection and substantive and procedural due process of law in violation of the guarantees of the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

3. Whether Louisiana Civil Code Article 1502, which provides that any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that *quantum* is unconstitutional as applied to the facts in this case and is a denial of equal protection and substantive and procedural due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

4. Whether Louisiana Civil Code Article 1504, which provides that on the death of the donor or testator the reduction of the donation, whether *inter vivos* or *mortis causa*, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it, is a personal action which is unconstitutional as applied to the facts in this case and because it denies equal

protection and substantive and procedural due process of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

LIST OF PARTIES TO PROCEEDINGS BELOW

Appellant Below:

Mary Williams Cazalas, Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas

Appellee Below:

Julia C. Griot, Dative Testamentary Executrix of the Succession of Francis Joseph Cazalas, the deceased father and forced heir of Albert Joseph Cazalas.

Interested Party Below:

State of Louisiana because the Constitutionality of state statutes is an issue before this court and Honorable William Guste, as Attorney General of the State of Louisiana.

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OPINIONS AND JUDGMENTS BELOW[1]

This appeal to the Supreme Court of the United States is from a final judgment of the Supreme Court of the State of Louisiana, denying the Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984. The opinion of the trial court does not appear in any official or unofficial report but it is included herein as Appendix A, and the Reasons for Judgment are at Appendix B. The opinion of the Civil District Court on the Petition For Rehearing was entered June 3, 1983, and it is included herein at Appendix C. The opinion of the Fourth Circuit Court of Appeal entered June 7, 1984, is published at 452 So.2d 768 (La. App. 4th Cir. 1984) and it is included herein at Appendix D. The denial of the petition for writ of certiorari by the Supreme Court of the State of Louisiana entered October 5, 1984, is not reported. It is included herein at Appendix E. The denial by the Supreme Court of the State of Louisiana of the "Motion to Stay Execution of the Judgment of the Fourth Circuit Court of Appeal Pending a Timely Appeal to the United States Supreme Court" by letter dated October 17, 1984, is at Appendix J.

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1. Documents and pages in the record of the Civil District Court for the Parish of Orleans are not numbered. For that reason, citation to documents and pages by number could not be made in this Jurisdictional Statement. The judgments appealed from are reproduced at Appendices A, B, C, D and E.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from the final judgment of the Supreme Court of the State of Louisiana holding constitutional the forced heirship laws of the State of Louisiana, Louisiana Civil Code Articles 1494, 1502 and 1504, which were challenged first in the District Court by the dative testamentary executrix of the Succession of Albert Joseph Cazalas as being repugnant to the Constitution of the United States of America because they deny equal protection and substantive and procedural due process of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and they are unconstitutional as applied to the facts in this case. A second jurisdictional issue raised before the courts below was that the action for reduction filed by Francis Joseph Cazalas, who survived his son, Albert Joseph Cazalas, abated with the death of Francis Joseph Cazalas on the day after the action for reduction was filed because he died before any hearing or ruling by the district court was rendered. An action for reduction is a strictly personal action and a strictly personal action abates with the death of the party in accordance with Louisiana Code of Civil Procedure Article 428; therefore, the dative testamentary executrix of the Succession of Francis Joseph Cazalas lacks standing in the action for reduction. This is a jurisdictional question which this court has jurisdiction over.

The Supreme Court of Louisiana entered its judgment denying the Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from the Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984. No Petition for rehearing was filed. A Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Louisiana on October 15, 1984, in the Fourth Circuit

Court of Appeal for the State of Louisiana on October 15, 1984, and in the Civil District Court for the Parish of Orleans on October 15, 1984.

This Court's jurisdiction over this appeal is conferred by 28 U.S.C. Section 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES

This appeal involves the validity of the forced heirship laws of the State of Louisiana and whether they are unconstitutional as applied in the facts in this case and whether they deny substantive and procedural due process of the law and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America. These are as follows:

Louisiana Civil Code Article 1494.

> "With respect to separate property, donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both, provided that where the legal portion of the surviving father, mother, or both is less than one-third the forced portion shall not be increased to one-third but shall remain at the legal portion."

Louisiana Civil Code Art. 1502. Reduction of excessive donations

> Any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the

prejudice of the forced heirs, is not null, but only reducible to that *quantum*.

Any donation *inter vivos*, from the donor to his descendants, exceeding the *quantum* of which a person may legally dispose to the prejudice of forced heirs, is not reducible to that *quantum* if each such forced heir and the root represented by each forced heir receives the same value of property by donation *inter vivos* during the calendar year. Such donation *inter vivos* shall not be included in the calculation of the disposable portion as set forth in Article 1234 nor as set forth in Article 1505. Amended by Acts 1981, No. 765, § 1.

Louisiana Civil Code Art. 1504. Reduction of donations, exclusive right of forced heirs

On the death of the donor or testator, the reduction of the donation, whether *inter vivos* or *mortis causa*, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.

AMENDMENT [V] to the Constitution of the United States of America

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.*
(Emphasis added)

Amendment XIV, Section 1 to the Constitution of the United States of America

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*
(Emphasis added)

This appeal also involves whether the action for reduction filed by a forced heir, Francis Joseph Cazalas, on the day before his death, which was never heard or ruled on by the District Court, abated with his death and the executrix of the Succession of Francis Joseph Cazalas lacks standing in the action for reduction. An action for reduction by a forced heir has been held to be a strictly personal action in *Succession of Hennican*, 248 So.2d 385, 387 (La. App. 4th Cir. 1971) and in *Tompkins v. Prentice*, 12 La. Ann. 465 (1857).

Louisiana Code of Civil Procedure Article 428 reads as follows:

> **Art. 428. No abatement on death of party**
>
> An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal.

Louisiana Civil Code Article 2315 now reads as follows:

> **Art. 2315. Liability for acts causing damage; survival of action**
>
> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.
>
> The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community right of the surviving spouse.
>
> The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such

spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover the damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs whether suit has been instituted thereon by the survivor or not.

As used in this article, the words, "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

Amended by Acts 1982, No. 202, § 1.

STATEMENT OF THE CASE

The decedent, Albert Joseph Cazalas, was the son of Juanita Gonzales Cazalas and Francis Joseph Cazalas. He died testate in the City of New Orleans, Parish of Orleans, State of Louisiana, on February 8, 1981. He left a testament in olographic form dated May 8, 1964. This testament has been probated in these proceedings, and by its terms he left all of his community property and all of his separate property which he died possessed of to his wife, Mary Williams Cazalas.

The decedent did not appoint an executrix in his testa-

ment; however his widow, Mary Williams Cazalas, was appointed administratrix on February 19, 1981. This was amended on February 22, 1982, to have her title changed to Dative Testamentary Executrix. The executrix filed a Descriptive List of Assets and Liabilities of the succession on February 19, 1981. The estate was shown to be solvent at that time. An Amended Descriptive List of the Assets and Liabilities was filed on October 19, 1982, showing the succession still solvent. The First Accounting for the period February 8, 1981, to September 5, 1982, was also filed on October 19, 1982.

The decedent's mother, Juanita Gonzalas, wife of Francis Joseph Cazalas, predeceased her son on May 13, 1965. The decedent was married twice. His first wife was Janice Mc Laughlin from whom he was divorced by judgment of the Civil District Court for the Parish of Orleans, on January 30, 1962, in proceedings No. 385-379 of the Docket of that Court. There were no children born during that marriage, and no children were adopted. The decedent was married to the executrix, Mary Williams, and of that marriage no children were born nor adopted. The decedent was not the father of any children born during his lifetime, nor did he ever adopt anyone nor was he ever adopted by anyone. The decedent was survived by his father, Francis Joseph Cazalas.

Pursuant to Article 1494 of the Louisiana Civil Code as amended in 1979, the decedent's father became a forced heir for one-third of his son's separate property. On February 25, 1982, the decedent's father, through his attorney, Girard J. Fernandez, requested that the executrix recognize Francis Joseph Cazalas as a forced heir of his son's estate and place him in possession of his forced portion. The executrix attempted to enter into a settlement agreement with the decedent's father, but he refused. On August 6, 1982, Francis

Joseph Cazalas filed a petition for reduction praying that he be placed in possession as a forced heir to an undivided interest of all the property belonging to the decedent's estate. The following day, August 7, 1982, the decedent's father died, and there was no hearing or judgment by the court prior to his death.

On February 7, 1983, JULIA C. GRIOT, the Dative Testamentary Executrix, of the Estate of FRANCIS JOSEPH CAZALAS, whose succession has been opened in the Civil District Court for the Parish of Orleans in proceedings No. 82-17264, filed a Rule to Show Cause why:

1. The Administratrix in the Succession of ALBERT JOSEPH CAZALAS should not file a Tableau of Distribution and an account in compliance with the requirements of the laws of the State of Louisiana;
2. Amend the Federal Estate Tax and Louisiana Inheritance Tax return to report taxes due by the decedent's father as a forced heir of his son;
3. Recognize decedent's father as a forced heir of his son and place him in possession of his undivided interest in the Estate of his son; and
4. Remove the Administratrix of the Estate of ALBERT JOSEPH CAZALAS and a Dative Testamentary Executrix be appointed in her place if she fails or refuses to proceed with the administration of her husband's estate forthwith and within delays to be fixed by the court.

The estate tax was not submitted to the United States Internal Revenue Service until nine months after the death of the decedent in order to delay payment of taxes as long as

possible, and to properly prepare the returns which were complex. Because of the complexity of the succession, the audit of the succession by the Internal Revenue Service took a considerable amount of time. The final payment of the Louisiana Estate Taxes was made on March 15, 1983, after an adjustment was made in accordance with the determination of the United States Internal Revenue Service. Preparation of the accounting filed in the district court required considerable time because of the complexity of the succession. (See Supplemental Memorandum in Support of Preemptory Exception filed March 28, 1983).

It was the position of the executrix, Mary Williams Cazalas, that the petition for reduction filed by decedent's father abated upon death of the father on August 7, 1982. The pleading filed by Julia C. Griot, Dative Testamentary Executrix of the Estate of Francis Joseph Cazalas, entitled a Rule To Show Cause is in the form of a petition. Mary Williams Cazalas filed a preemptory exception of no right or cause of action and alleged that the petition should be dismissed on the grounds that the mover had no cause or right of action.

All of the separate and community property which Albert Joseph Cazalas died possessed of was left by him to his wife, Mary Williams Cazalas, by a donation *mortis causa*. Mary Williams Cazalas was the universal legatee under the provisions of the olographic will, and she has had full seizin of all of the property of which Albert Joseph Cazalas died possessed of, both separate and community, from the time of his death. The only right which Francis Joseph Cazalas had from the time of his son's death was the strictly personal right to bring an action for reduction as to the separate property only of his son in accordance with the provisions of Louisiana Civil Code Article 1494, as amended in 1979,

1502 and 1504.

On August 6, 1982, Francis Joseph Cazalas exercised his right to file the petition for reduction in the Succession of Albert Joseph Cazalas. Only Francis Joseph Cazalas had a right to bring the action. He had not assigned his right and as he was alive, there was no heir. That was his strictly personal right which he exercised prior to his death. No one else had a right to bring the action for reduction at the time he brought the action on August 6, 1982. The rule was to be heard on August 26, 1982. On August 7, 1982, Francis Joseph Cazalas died, and there was no hearing nor was there any ruling on his petition for reduction prior to his death. The petition for reduction was a strictly personal right of action of Francis Joseph Cazalas which abated with his death in accordance with the provisions of Louisiana Code of Civil Procedure Article 428, since it was never converted to a property right by the rendition of a judgment. See *Succession of Hennican*, 248 So.2d 385 (La.App. 4th Cir. 1971) and *Tompkins v. Prentice*, 12 La.Ann. 465 (1857).

The district court rejected the argument of Mary Williams Cazalas that the action for reduction abated upon the death of Francis Joseph Cazalas. The Court ruled that the fact that Francis Joseph Cazalas exercised his own rights as a forced heir in no way precluded his heirs from continuing to assert Francis Joseph Cazalas' rights as a forced heir and/or from asserting their own rights as heirs to a forced heir. The exception of no right or cause of action filed by the executrix for the estate of Albert Joseph Cazalas was overruled.

Although the estate of Francis Joseph Cazalas sought a one-third reduction as to separate and community property left by testamentary disposition, the Court observed that Louisiana Civil Code Article 1494, as amended in 1979,

provides for forced heirship for parents of childless children only as to separate property. Judgment was rendered placing Mary Williams Cazalas into possession of all community property. The request to have Mary Williams Cazalas removed as Dative Testamentary Executrix for alleged failure to proceed with the administration of the estate was denied with written reasons. (See Appendix A and B) The Motion for a Rehearing filed by Julia C. Griot was denied, see Appendix C.

From the judgment of the District Court, Mary Williams Cazalas, as Dative Testamentary Executrix, prosecuted an appeal to the Fourth Circuit Court of Appeal. On June 7, 1984, the appellate court affirmed the judgment of the district court in its opinion rendered on June 7, 1984, which is published at 452 So.2d 768 (La. App. 4th Cir. 1984) and is attached hereto as Appendix D. From that judgment, Mary Williams Cazalas filed a Petition for Writ of Certiorari and Review to the Court of Appeal, Fourth Circuit, State of Louisiana, on July 3, 1984. The Supreme Court of the State of Louisiana denied her petition on October 5, 1984. See Appendix E. She filed a notice of appeal to this Court on October 15, 1984. See Appendices F, G and H. She filed a Motion to Stay Execution of the Judgment of the Fourth Circuit Court of Appeal Pending a Timely Appeal to the United States Supreme Court on October 15, 1984. See Appendix I. This motion was denied on October 17, 1984. See Appendix J. The case is now in the District Court for the Parish of Orleans, and Mary Williams Cazalas, as Dative Testamentary Executrix, is proceeding with the preparation of the accounting and the tableau of distribution to be filed in the succession no later than December 31, 1984.

The heir of Francis Joseph Cazalas resides in the State of Alabama where there is no forced heirship. There is no valid or reasonable state interest to justify placing the heir of Francis Joseph Cazalas in possession of property of Albert Joseph Cazalas that he expressly left to his widow, Mary Williams Cazalas.

STATEMENT OF REASONS THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT

Forced heirship essentially represents a primitive kind of socialism. The purpose of forced heirship has been to prevent the accumulation of fortunes which were considered to pose a dangerous threat to democracy. The principles of forced heirship are archaic and unconstitutional. They deny substantive and procedural due process of the law and equal protection of the law.

In the case of the Louisiana forced heirship laws, there is an insurmountable barrier created so that the decedent is prohibited from leaving a will disposing of his or her property in a manner intended by the decedent. Although the will is valid, if a forced heir sues for reduction, the intent of the testator as expressed in the will cannot be fulfilled. The state of Louisiana has arbitrarily chosen the amount that can be reduced from the property left by the decedent. No reasonable basis for forced heirship exists. The holding of the Fourth Circuit in this case is that if the forced heir is deceased, a person who is not even a forced heir but is an heir or assign of the forced heir can compel the legatee to reduce the legacy by the amount of the forced portion. This is taking of property of the decedent left to the legatee that constitutes a denial of due process and equal protection

of law. It denies the decedent liberty to dispose of property which belongs to him or her without a reasonable state interest for doing so.

When a judgment of a Court changes a rule, the date of that opinion is the crucial date. To hold that the statute is unconstitutional with prospective effect would protect property rights of third persons who have relied on the unconstitutional statute, but it would not bar the plaintiff's claim as her suit has not been considered or decided previously.

Parents are no longer forced heirs as of January 1, 1982. However, children are forced heirs, and the decision of this Court in this case as to the constitutionality of forced heirship and whether an action for reduction filed by a forced heir abates with the death of the forced heir when filed by a forced heir who dies before any hearing or judgment is rendered will have far reaching effects on forced heirship as to children. It will also prevent an injustice in this case here before the court and in other actions for reduction filed by parents who were forced heirs prior to January 1, 1982, that have not been ruled on.

ABATEMENT WITH DEATH OF THE FORCED HEIR

Louisiana Civil Code Article 1494, as amended in 1979, reads as follows:

> **Art. 1494. Disposable portion when parents survive.**
>
> Art. 1494. With respect to separate property, donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property, if

the disposer, having no children, leaves a father, mother, or both, provided that where the legal portion of the surviving father, mother, or both is less than one-third the forced portion shall not be increased to one-third but shall remain at the legal portion.

Louisiana Civil Code Article 1502 reads as follows:

Art. 1502. Reduction of excessive donations

Any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that *quantum.*

Any donation *inter vivos*, from the donor to his descendants, exceeding the *quantum* of which a person may legally dispose to the prejudice of forced heirs, is not reducible to that *quantum* if each such forced heir and the root represented by each forced heir receives the same value of property by donation *inter vivos* during the calendar year. Such donation *inter vivos* shall not be included in the calculation of the disposable portion as set forth in Article 1234 nor as set forth in Article 1505.

Louisiana Civil Code Article 1504 reads as follows:

Art. 1504. Reduction of donations, exclusive right of forced heirs

> On the death of the donor or testator, the reduction of the donation, whether *inter vivos* or *mortis causa*, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.

THE DOCTRINE OF SEIZIN

Seizin performs the function of preventing a gap in possession. In Civil Law, seizin is not synonymous with ownership. Civil Law expresses the doctrine by the term *le mort saisit le vif* (the dead give seizin to the living) and Civil Code Article 940 incorporates it into the Louisiana Civil Code. In essence, through seizin, the legal personality of the deceased descends immediately and instantly upon the heirs without any act on their part. An heir with seizin can take possession of the decedent's estate without any formalities. The seized heir may bring any action which the decedent had a right to bring or defend any action which third persons bring or defend any actions which third persons had against the decedent. The seized heirs have a constructive possession and it is left to them to add to it possession in fact. Seizin is not the acquisition of ownership but it is the legal investiture of possession. Ownership of property inherited by the deceased heirs or legatees is transmitted by operation of law to all successors with or without seizin. Legal and testamentary heirs or universal legatees do acquire seizin and succeed to all rights the deceased had which can be transmitted. Testamentary heirs inherit through the will or testament of the decedent. A universal legacy is a testamentary disposition by which the testator gives to one or several persons the whole of the property which he or she leaves at death. See Jacobs, *A Reasoned Seizin and Prohibited*

Substitution, 56 Tul.L.Rev. 350-369 (1981) and the cases cited therein. See also Fischer, *Seizin: Rights and Obligations of the Heir Before Acceptance or Renunciation*, 49 Tul. L. Rev. 1110-1123 (1975).

Serious doubts have been raised regarding the continuing vitality of the doctrine of the right of possession otherwise referred to as constructive possession, because of significant exceptions to *le mort saisit le vif*. Over the years, statutes have eroded the application of seizin, one being the inheritance tax statute which was first enacted in 1906. Louisiana Code of Civil Procedure Articles 3211 and 685 have also eroded the doctrine of seizin. Under the provisions of Article 3211, the succession representative shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor. Under Article 685, the succession representative appointed by the Court has the right of action of the deceased while the succession is under administration of the appointee. Because the succession representative has full seizin of all property of the deceased, the utility of the concept of seizin in Louisiana law has been questioned by legal scholars. Fischer, *Seizin: Rights and Obligations of the Heir Before Acceptance or Renunciation*, 49 Tul.L.Rev. 1110 (1975).

ABATEMENT OF THE PERSONAL ACTION FOR REDUCTION

The Court held that the right to sue for reduction is a personal right in *Succession of Hennican*, 248 So.2d 385, 387 (4th Cir. 1971). See also *Tompkins v. Prentice*, 12 La. Ann. 465 (1857). This Court stated that if a debtor refuses or neglects to accept an inheritance, which is a property right, to the prejudice of his creditors, Louisiana Civil Code Article 1990 provides that the creditors may accept the succession and exercise all the rights in the manner provided

for in the title of successions. However, the creditors cannot exercise the debtor's right to sue for reduction because it is a strictly personal right. See also *Cox v. Von Ahlefeldt*, 105 La. 543, 30 So. 175 (1900).

Louisiana Code of Civil Procedure Article 428 provides as follows:

> "An Action does not abate on the death of a party. *The only exception to this rule is an action to enforce a right or obligation which is strictly personal.*"
> (Emphasis added.)

Since the right to sue for reduction is a strictly personal action, the action abates upon the death of the party who brings the action for reduction when no decision has been rendered by the Court at the time of the party's death to convert the strictly personal action for reduction to a property right.

Louisiana Civil Code Articles 1502 and 1504 do not provide for a survival of the action for reduction filed by the forced heir. Article 1504 merely grants a "right of action" to specified survivors in the order of exclusionary preference and absent these specified survivors this right of action is not transmitted to other persons. Succession representatives are not listed as survivors. The article is in the disjunctive and not in the conjunctive. A cause of action which is created by statute does not survive unless declared to do so by the statute itself or by provision for a survival in some other statute. Survival statutes are strictly construed. See *Haas v. Baton Rouge General Hospital,* 357 So.2d 605, 606-607 (La.App. 1st Cir. 1978).

No decision of a Louisiana court holding that an action for reduction filed by the forced heir and not ruled on abates with the forced heir's death has been found. However, the reasoning by the Courts as to abatement of actions brought under Louisiana Civil Code Article 2315 is applicable to abatement of an action for reduction.

In *Kerner v. Trans-Mississippi Terminal Railroad Company*, 158 La. 853, 104 So. 740 (1925), the Court held that a survival action to recover damages under Louisiana Civil Code Article 2315 brought by a beneficiary who died prior to trial abated upon the death of the beneficiary, and there was no action for members of a deferred class. The court considered the action a personal action and the statute had not been amended at that time to provide that the right is a property right.

Following the *Kerner* decision, the Code of Civil Procedure was enacted effective January 1, 1961, and Article 428 as it is now written was included in the code. The legislature amended Article 2315 of the Civil Code to provide that the right to recover damages granted to a beneficiary under that Article is a "property right" which, on the death of a beneficiary, is inherited by his legal, instituted or regular heirs, whether the suit has been instituted thereon by the survivor or not. Since the right to recover under Article 2315 has been declared by the Louisiana Legislature to be a property right, it is not strictly personal and is therefore heritable. The rights of the beneficiaries named in Article 2315 arise by virtue of the language of the statute and they are not, properly speaking, inherited rights. See Johnson, *Death on the Callais Coach: the Mystery of Louisiana Wrongful Death and Survival Actions*, 37 La.L.Rev. 1-58 (1976).

The defense of abatement can only properly be raised when the victim in an Article 2315 action has filed an action

prior to death. Abatement does not apply to a right to recover damages before filing. If the victim dies, survived by a beneficiary or beneficiaries under Article 2315, the action can be brought by them, and if the victim dies without leaving a beneficiary under Article 2315, it is settled that his right to recover damages is not survived, nor is there a wrongful death action. If the victim commences the action, but dies before it is completed and leaves no beneficiaries named under Article 2315, there is no one who has a cause or right of action and the action does not survive. *Robertson v. Wegmann, Executor, et al.*, 436 U.S. 584, 98 S.Ct. 607, 54 L.Ed.2d 477 (1978); See also Johnson, *Death on the Callais Coach: the Mystery of Louisiana Wrongful Death and Survival Actions*, 37 La.L.Rev. 1-58 (1976).

Under Louisiana Civil Code Article 2315, the status of the various beneficiaries must be determined as of the moment of the death of the decedent, and the preferred class must actually be empty before the next deferred class is entitled to an action. The fact that the preferred class is occupied at the death of the decedent by a person who survives the decedent only fictitiously or for a short period of time, or who is barred from bringing the action by his own contributory negligence, does not make the preferred class empty and permit another deferred class member to sue as a beneficiary. Gonzales v. The Succession of Medica, 141 So.2d 887 (La.App. 2d Cir. 1962); *Johnson, Death on the Callais Coach: the Mystery of Louisiana Wrongful Death and Survival Actions*, 37 La.L.Rev. 1, 14 (1976).

In *Maher v. Schlosser*, 144 So.2d 706 (La.App. 4th Cir. 1962), the Court held that a right of action for medical malpractice against a physician and his insurer was not heritable, and the action could not be pursued by the deceased plaintiff's forced heirs and legatees, her nephews and

niece, where the plaintiff had obtained no judgment and the action was commenced before the amendments to no abatement and survival statutes became effective. The Court quoted the explanatory note of Henry G. McMahon under the amended Louisiana Civil Code Article 2315 as follows:

> "This article was amended on the recommendation of the Louisiana State Law Institute primarily to broaden the right to recover damages for wrongful death, and to solve the problems which otherwise would be presented by the doctrine of abatement of actions. As amended, it implements Art. 428, LSA-Code of Civil Procedure. The amendment makes a number of changes in the law. First, it makes a right of action, or an action, to recover property damage heritable. Second, it broadens the primary class of survivors so as to include major children. Third, if a survivor who has the right to recover damages for the physical injury or wrongful death of a deceased person should die, after instituting suit but before judgment, the instituted action is inherited by the survivor's heirs who may be substituted as parties plaintiff. In this respect, the amendment overrules legislatively Chivers v. Roger, 1898, 50 La. Ann. 57, 23 So. 100, and the cases based thereon. Fourth, if the survivor should die before instituting suit to recover damages for the physical injury or wrongful death of a deceased person, the right to sue is inherited by the survivor's heirs. In this respect, the amendment overrules legislatively Kerner v. Trans-Mississippi Terminal R. Co., 1925, 158 La. 853, 104 So. 740, and the cases which have followed it. Fifth, the amendment places relatives by adoption on the same basis as blood relatives.* * *"

The Court also noted as follows:

> Thus the Law Institute in recommending and the Legislature in adopting LSA-C.C.P. art. 428 and by amending LSA-C.C. art. 2315 recognized that under the jurisprudence and the then existing statute law that a right of action or an action under LSA-C.C. art. 2315 was not heritable and could only be pursued after the death of an injured person by the survivors of such person as enumerated in said article.

In *Robertson v. Wegmann, Executor, et al.*, 436 U.S. 584, 591 (1978), this Court observed that certain types of actions which would automatically abate on the plaintiff's death in many states, such as defamation and malicious prosecution, apparently survive in Louisiana. In actions other than those for damaged property, however, Louisiana does not allow the decedent's personal representative to be substituted as plaintiff; rather, the action survives only in favor of a spouse, children, parents *or* siblings.

In *Roche v. Big Moose Oil Field Truck Service*, 381 So. 2d 396, 399 (La. 1980) the Louisiana Supreme Court stated:

> It is well-settled in the jurisprudence that the right of action created by Article 2315 may be extended only to the beneficiaries named in the statute and that *the classes of beneficiaries must be strictly construed*. As stated in *Thompson v. Vestal Lumber Manufacturing Co.*, 16 So.2d 594 (La.App. 4th Cir. 1943), "Upon whom [the right of action] should devolve was a matter that

> peculiarly addressed itself to the Legislature. It has acted and the beneficiaries named may not be increased by judicial action." (Emphasis added)

The right of action for reduction has been held to be a personal right of action by the Louisiana Supreme Court in *Tompkins v. Prentice*, 12 La.Ann. 465 (1857) and by the court in *Succession of Hennican*, 248 So.2d 385, 387 (La. App. 4th Cir. 1971). The Louisiana legislature has not changed this holding by any statutory action as it did when it amended Article 2315. Article 1504 states in the disjunctive those persons granted a "right of action" for reduction. *As Article 1504 is in the disjunctive, like Article 2315, the specified survivors in each article are in the order of exclusionary preference. As these are survival statutes, they must be strictly construed. The title of Article 1504 reflects that the legislature intended that the action be an exclusive right of forced heirs as it reads:*

"Art. 1504. Reduction of donations, exclusive right of forced heirs."

The action for reduction is a right to attack the will of the testator to obtain a judgment ordering that the forced heir be placed in possession of his or her legitime. Until such a judgment is obtained, the right is a strictly personal right. After such a judgment is obtained, that judgment becomes a property right. In the case here before the court, Francis Joseph Cazalas only had a strictly personal right to attack the will in order to obtain a reduction of the legacy that encroached on his legitime. He did not have a property right at any time as his action for reduction was never heard and no judgment was ever rendered prior to his death. His action for reduction did not survive because it was a strictly personal action. It cannot be brought now by his heir or assigns

because the forced heir himself brought the action for himself. Therefore, the other exclusionary class members, the forced heir's heirs and assigns, are precluded from bringing the action for reduction. As the statute does not provide for a survival of the action for reduction to anyone once it is brought by the forced heir, and survival statutes must be strictly construed, the action for reduction filed by Francis Joseph Cazalas on August 6, 1982, abated with his death on August 7, 1982, and it cannot be brought by his heirs or assigns. Therefore, the wishes of the testator, Albert Joseph Cazalas, stated in his olographic will, that his wife, Mary Williams Cazalas, is to have all of his property both separate and community that he dies possessed of should be granted by the court by placing Mary Williams Cazalas into possession of all the separate property owned by Albert Joseph Cazalas at the time of his death upon motion of the executrix for his succession.

FORCED HEIRSHIP DENIES EQUAL PROTECTION OF THE LAW AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Louisiana's succession laws reserve a portion of the estate of a decedent in favor of surviving members of certain classes of individuals regardless of the intention of the testator, and Louisiana Civil Code Article 1494 reserved that portion for parents. The strong societal values which underlie the institution of forced heirship in Louisiana is evidenced by the considerable protection afforded the rights of forced heirs in the laws of Louisiana. However, the strength of the adherence to the values supporting forced heirship is weakening. See Vetter, *Family Law - New Solution for Old Problems,* 29 La. Bar J., No. 5, page 231, February, 1982; Rigby, *Some Views, Old and New, on Recent Developments in*

Family Law, 29 La. Bar J., No. 5 pages 232-236, February, 1982; Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 Tul.L.Rev. 5 (1977).

Act 778 of 1979 makes parents forced heirs only as to the separate property of their children who predeceased them without descendants. Thus, a testator could donate his interest in community property free of any legal complaint by the parents. The amendment left Louisiana Civil Code Article 1494 unchanged otherwise. This change in the Article, gave more freedom to dispose of property as the testator sees fit. It increased the flexibility in Estate planning and allowed the Testator to provide more adequately for family members in greatest need, particularly the surviving spouse. It may be surmised that the Legislature in enacting Act 778 was motivated in part by a desire to strengthen the position of the surviving spouse. This would be consistent with other recent changes favoring the surviving spouse. See particularly the 1979 Amendments to the Louisiana Civil Code, Article 915, 1979 Louisiana Act No. 607. Section 1; and, to Article 916, 1979 Louisiana Act No. 678. Section 1; and the usufruct of the surviving spouse. The surviving spouse is not a forced heir and need not be left anything in addition to the one-half interest in the community property, which the survivor independently owns. The surviving spouse benefits from this increased freedom to donate which Act 778 affords only to the extent that the predeceased spouse uses it to bequeath to the survivor that portion earlier reserved for the parents. The testator may choose instead to leave the community property to strangers.

Since the amendment to Louisiana Civil Code Article 1494 in 1979, the Louisiana Legislature has further concluded that parents should not be designated as forced heirs. The legislature abolished forced heirship as to parents by repealing Article 1494 by Act 1981, No. 442, Section 1.

The repeal was made effective as of January 1, 1982, and applied to the property of persons whose date of death was after December 31, 1981. Therefore, since Albert Joseph Cazalas died on February 8, 1981, Louisiana Civil Code Article 1494, as amended in 1979, was the applicable statute.

The Louisiana law providing for forced heirship for children and parents is a denial of substantive and procedural due process of law. Louisiana is the only state in the United States that has forced heirship. Texas is the only other state that ever tried it, and after ten years experience, Texas repealed the system. See Texas Statutes, Act of July 24, 1856, Ch. LXXV; 4 H. Gammel, *Laws of Texas*, 423 (1898). See also Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 La.L.Rev. 42 (1941).

Forced heirship essentially represents a primitive kind of socialism. The purpose of forced heirship has been to prevent the accumulation of fortunes which were considered to pose a dangerous threat to democracy. Max Nathan reviewed the archaic and unconstitutional principles of forced heirship in his article, *An Assault On the Citadel: A Rejection of Forced Heirship*, 52 Tul.L.Rev. 5 (1977). See also, Parker *Another Look at Louisiana Succession Law, the Ramification of Brown*, 41 La.L.Rev. 1255 (1981) and Picou and Cortina, *Requiem For a Civil Code: The Louisiana Legislature In Action*, 7 So.L.Rev. 227-234 (1981). Changes occurring in the American family structure must be taken into account by the legal system. Failure to do so means society must attempt to govern itself with antiquated laws. That the Louisiana legislature did take such an account is evidenced by the 1979 amendment to the Louisiana Civil Code Article 1494 and by its subsequent repeal in 1981.

The family property justification for forced heirship no longer exists. Compulsive resubdivision of family property

is no longer a necessary function of succession law. The federal tax system can be relied upon to prevent the undue concentration of family wealth. Forced heirship with regard to ascendents is archaic and outmoded. The legislature has so determined by its abolition effective January 1, 1982, only about eleven months after the death of Albert Joseph Cazalas. Parents rarely have a financial interest to protect other than by the laws of intestacy. In estate planning, a parent may donate assets to a child, and the last thing the parent wants is for the property to revert to him. Where parents are aged, one can reasonably ask whether in this day of welfare and social security benefits, the need to protect the aged by forced heirship has not been substantially reduced if not totally eliminated. Nathan, *An Assualt On the Citadel: A Rejection of Forced Heirship*, 52 Tul.L.Rev. 5 (1977).

Since the enactment of the Louisiana Civil Code of 1825, the trend has been to look upon the surviving spouse with increasing favor. The usufruct of the surviving spouse over the decedent's intestate share of the community was granted in 1844. In 1938, the surviving spouse became a regular heir. In 1975, a spouse was permitted to confirm a usufruct for life (not terminable on remarriage) in his will, and in 1976 the "family home" owned by a second or subsequent community was subjected to the usufruct of the surviving spouse, even though the decedent left children of a prior marriage. This, too, may be confirmed for life by will. In 1977, proposed legislation would have extended a usufruct over all community property of the subsequent marriage, even though the decedent left children of a prior marriage. Necessarily, of course, this increasing concern for the surviving spouse means correspondingly less concern for the immediate interests of forced heirs. In 1979, the legislature amended Louisiana Civil Code Article 1494 so that parents were no longer forced heirs as to community property. The repeal of

Article 1494 in 1981 is another expression of the Legislature's concern for the surviving spouse.

In the case here before the Court, parental forced heirship causes an excessive hardship and unconscionable abuse on the surviving spouse. The legitime intended by Article 1494 for the forced heir, the parent, will be inherited by heirs of the forced heir who is deceased. The decedent, Albert Joseph Cazalas, did not want his father or his father's heirs to inherit that which belonged to him at the time of his death, as he stated in his olographic will by leaving all that he died possessed of to his spouse. A testator will generally know better how to distribute his property among his heirs than does the state by making inalterable rules that apply to everyone virtually without exception. There is no reason to fear changing forced heirship merely because it has a long and extensive history. Times and conditions have changed and the law should change with them. There is no reason to be tied down to history and an archaic institution that is unsuited to our situation today and that is in violation of the Constitution of the United States of America. See Nathan, *An Assualt On The Citadel: A Rejection of Forced Heirship*, 52 Tul.L.Rev. 5, 16-19 (1977).

Childless couples are penalized under Louisiana law by requiring that the parents of the deceased spouse are forced heirs. There is no reasonable basis to treat couples without children, differently to couples with children regarding parents inheritance rights. This denies equal protection of the laws to couples without children, in violation of the Fourteenth Amendment to the Constitution of the United States. See Yockey, *Successions-Proposed Louisiana Civil Code Amendments To Favor The Surviving Spouse of a Childless Marriage When a Parent of the Deceased Spouse also Survives*, 37 Tul.L.Rev. 322-326 (1963).

The Fourth Circuit Court of Appeal cited *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459 (1977) which supports the position of Mary Williams Cazalas.

In *Trimble v. Gordon, supra.*, the court held to be unconstitutional a state statute which provided that illegitimate children could inherit from their mother's intestate succession but not from the intestate succession of their father. The Court recognized that its judicial task was the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in regulating the orderly disposition of property at death. The question in that case was the constitutionality of a state intestate succession law that treated illegitimate children differently from legitimate children. In arriving at the holding that the statute was unconstitutional, the Court used the traditional equal protection analysis of asking whether the statutory differentiation was justified by the promotion of recognized state objectives. *Although the father could have left his property to his illegitimate child by a will, the Court reasoned that this could not save the statute.* See also *Reed v. Reed*, 404 U.S. 71 (1971).

In *Succession of Clivens*, 426 So.2d 585 (La. 1983) the Court stated that new case law has traditionally had retroactive effect, but retroaction is not required by the United States Constitution. The states are free to limit the retroactivity of their civil decisional law. See *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) and *Sunburst Oil & Refining Co. v. Great Northern Railway*, 91 Mont. 216, 7 P.2d 927 (1932), affirmed 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The Court further observed that when a judgment of a court changes a rule, the date of that opinion is the crucial date. To hold that the statute is unconstitutional with prospective effect would protect property rights of third persons who have relied on the unconstitutional statute, but it would not bar the plaintiff's claim as her suit has not been considered or decided previously.

CONCLUSION

It is respectfully submitted that this Court should require plenary consideration of the judgment of the Supreme Court of the State of Louisiana appealed from herein with briefs on the merits and oral argument for the reasons stated above. It is further respectfully submitted that judgment should be reversed and that this Court should render judgment holding that the action for reduction filed by Francis Joseph Cazalas abated with his death; that the action is not heritable as it was a strictly personal action of the forced heir; as the forced heir exercised his strictly personal right of action prior to his death, his heirs are precluded from bringing the action for reduction because a member of the first exclusionary class, the forced heir, has already brought the action and the action has abated; that the succession representative of the Succession of Francis Joseph Cazalas has no standing and the Rule to Show Cause filed by her should be dismissed. As the issue of abatement is a jurisdictional issue this Court has authority to rule thereon. It is further respectfully represented that this Court should rule that the laws of the State of Louisiana providing for forced heirship and reduction of legacies to place forced heirs into possession of their legitime are unconstitutional as they deny substantive and procedural due process of the law and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Respectfully Submitted,

Mary Williams Cazalas

Mary Williams Cazalas

Andrew G. Bucaro per m.w.c.

Andrew G. Bucaro

CERTIFICATE OF SERVICE

I, MARY WILLIAMS CAZALAS, one of the attorneys for the Succession of Albert Joseph Cazalas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28 day of December, 1984, I served copies of the foregoing Jurisdictional Statement on all parties required to be served as follows:

1. On Girard J. Fernandez, Attorney for Julia C. Griot, by depositing three copies in a United States post office, with first class postage prepaid, certified, return receipt requested, addressed Girard J. Fernandez, 333 St. Charles Avenue, Suite 607, New Orleans, Louisiana, 70130.

2. On Honorable William Guste, as Attorney General of the State of Louisiana, by depositing three copies in a United States post office, with first class postage prepaid, certified, return receipt requested, addressed to Honorable William Guste, Attorney General of the State of Louisiana, 234 Loyola Avenue, New Orleans, Louisiana.

Mary Williams Cazalas

MARY WILLIAMS CAZALAS
Attorney for the
Succession of Albert Joseph Cazalas

APPENDIX A

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

SUCCESSION OF
ALBERT JOSEPH CAZALAS

NO. 81-2483
DIVISION "D"
DOCKET: 1

JUDGMENT
Filed April 20, 1983

The Rule to Show Cause, filed herein by Julia C. Griot, Dative Testamentary Executrix of the Estate of Francis J. Cazalas, and the Exception of No Right of Action or Cause of Action, filed herein by Mary Williams Cazalas, Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, came on for hearing on the 18th of March, 1983, and was taken under advisement by the Court.

PRESENT: SHERMAN F. RAPHAEL, Esq., attorney for Mary W. Cazalas,

GIRARD J. FERNANDEZ, Esq., attorney for Julia C. Griot,

WHEN, after hearing the pleadings, the evidence and the argument of counsel, the Court, after taking the matter under advisement for further consideration and adjudication, after considering the law and the testimony and other evidence adduced, for the written reasons this day given:

IT IS ORDERED, ADJUDGED AND DECREED That the Rule to Show Cause why Francis Joseph Cazalas should not be recognized as a forced heir, filed herein by Julia C.

Griot, Testamentary Dative Executrix of the Succession of Francis Joseph Cazalas, be and the same is hereby made absolute recognizing the said Francis Joseph Cazalas as a forced heir of his son, Albert Joseph Cazalas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the request to remove Mary Williams Cazalas as Administratrix of the Estate of Albert Joseph Cazalas, filed herein by Julia C. Griot, Testamentary Executrix of the Succession of Francis Joseph Cazalas, be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the Exception of No Right or Cause of Action, filed herein by Mary Williams Cazalas, Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, be and the same is hereby denied.

JUDGMENT READ, RENDERED AND SIGNED in Open Court on this 20 day of April, 1983.

/s/ Dom C. Grieshaber
JUDGE

APPENDIX B

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

SUCCESSION OF
ALBERT JOSEPH CAZALAS

NO. 81-2483
DIVISION "D"
DOCKET: 1

REASONS FOR JUDGMENT

Filed April 20, 1983

This matter came before this Court on a rule to show cause, filed by Julia C. Griot, Dative Testamentary Executrix of the Estate of Francis Joseph Cazalas, and on an Exception of No Right or Cause of Action, filed by Mary Cazalas, Dative Testamentary Executrix of the Estate of Albert Joseph Cazalas.

The rule to show cause, brought by Julia C. Griot, basically seeks to have the estate of Francis J. Cazalas recognized in the Succession of Albert J. Cazalas. The estate of Francis J. Cazalas's claims for recognition are under the forced heirship principles established for parents under La. Civil Code Article 1494, as amended in 1979.

On February 8, 1981, Albert J. Cazalas died testate leaving all separate and community property to his wife, Mary Williams Cazalas. Albert J. Cazalas was survived by his father, Francis J. Cazalas, and left no descendants.

On August 6, 1982, Francis J. Cazalas filed a petition and rule to show cause in these proceedings to have his forced heirship rights recognized by Mary Williams Cazalas. However, on August 7, 1982, Francis J. Cazalas died before the

rule could be heard by this Court.

Subsequently, on February 7, 1983, Julia C. Griot (Francis J. Cazalas's sister), as Dative Testamentary Executrix for the estate of Francis J. Cazalas, filed a similar petition and rule to show cause to that which was filed by Francis J. Cazalas on August 6, 1982. These actions, brought first by Francis J. Cazalas, and then by his estate, are in essence actions to reduce excessive donations mortis causa.

> According to the La. Civil Code Article 1504:
>
> ". . . the reduction of donations, whether inter vivos or mortis causa, can be sued for only by *forced heirs or their heirs* or assigns. . . ." (Emphasis added).

The Court rejects the argument by Mary Williams Cazalas that the heirs' action abated upon the death of Francis J. Cazalas. The fact that Francis J. Cazalas exercised his own rights as a forced heir in no way precludes his heirs from continuing to assert Francis J. Cazalas's rights as a forced heir, and/or from asserting their own rights as heirs to a forced heir. The exception of no right or cause of action, filed by the estate of Albert J. Cazalas, is thus overruled.

Although the estate of Francis J. Cazalas has sought a one-third reduction as to separate and community property left by testamentary disposition, La. Civil Code Article 1494, as amended in 1979, provides for forced heirship only as to separate property. Judgment will be rendered accordingly.

As to the request to have Mary Williams Cazalas removed

as Dative Testamentary Executrix for her failure to proceed with the administration of the estate, this request is denied at this time.

New Orleans, Louisiana,
on this 20 day of
April, 1983.

/s/ Dom C. Grieshaber
JUDGE

APPENDIX C

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

SUCCESSION OF
ALBERT JOSEPH CAZALAS

NO. 81-2483
DIVISION "D"
DOCKET: 1

JUDGMENT
Filed June 3, 1983

The Motion for a New Trial, filed herein by MRS. JULIA C. GRIOT, Dative Testamentary Executrix of the Succession of Francis Joseph Cazalas, came on for hearing on May 20, 1983, and was submitted to the Court.

PRESENT: MARY WILLIAMS CAZALAS, J. D.,
dative Testamentary
Executrix of Succession
of Albert Joseph Cazalas,

GIRARD J. FERNANDEZ, Esq., attorney for
Mover,

WHEN, after hearing the pleadings, the evidence and the argument of counsel, the Court, after taking the matter under advisement for further consideration and adjudication, after considering the law and the testimony and other evidence adduced:

IT IS ORDERED, ADJUDGED AND DECREED That the Motion for a New Trial, filed herein by MRS. JULIA C. GRIOT, Dative Testamentary Executrix of Succession of

Francis Joseph Cazalas, be and the same is hereby denied.

JUDGMENT RENDERED AND SIGNED in Open Court on this 3 day of June, 1983.

/s/ Dom C. Grieshaber
JUDGE

APPENDIX D

SUCCESSION OF
ALBERT JOSEPH CAZALAS

NO. CA 1565
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 81-2483
HONORABLE DOM GRIESHABER
JUDGE

JIM GARRISON
JUDGE

(Court composed of Judges Jim Garrison, Israel M. Augustine and William H. Byrnes, III)

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JUNE 07 1984

AFFIRMED

Albert Joseph Cazalas died while domiciled in Orleans Parish on February 8, 1981. At the time of his death, he was survived only by his wife, Mary Williams Cazalas, and by his father, Francis Joseph Cazalas. Albert Cazalas left a properly executed olographic will dated May 8, 1964 in which he left his entire estate, consisting of both community and separate property, to his wife, Mary Williams Cazalas. This will was probated and Mrs. Cazalas was appointed administratrix of her late husband's estate on February 19, 1981. On this same day, Mary Cazalas filed a Descriptive List of Assets and Liabilities of the estate in which the estate was shown to be solvent.

Upon Albert Cazalas' death, Francis Cazalas, became entitled as a forced heir to one-third of his son's separate property according to Civil Code Article 1494 as amended in 1979.[1] Shortly after Albert Cazalas' death, attorneys for Francis Cazalas contacted Mrs. Cazalas and her attorneys and requested that Francis Cazalas be recognized as a forced heir of his son's estate and that he be put into possession of his portion of the estate. This request was denied by Mrs. Cazalas. On August 6, 1982, Francis Cazalas filed a suit for reduction of an excessive donation mortis causa against Mary Cazalas. In this suit, Cazalas prayed that he be placed in possession of an undivided one-third interest of all of the property belonging to the decedent's estate. This matter was set to be heard on August 26, 1982; however, Francis Cazalas died on August 7, 1982.

Francis Cazalas was not survived by any forced heirs but

---

1. This article was later repealed and parents of children whose death occurs *after* December 31, 1981 are no longer forced heirs. However, Albert Cazalas died on February 8, 1981, eleven months prior to the effective date of this repeal.

his properly executed statutory will named his sister, Julia C. Griot, as residuary legatee of his estate. Ms. Griot was appointed Dative Testamentary Executrix of Francis Cazalas' estate. In her capacity as succession representative of the Estate of Francis Cazalas, she filed a rule against the Executrix of the Estate of Albert Cazalas to show cause why Francis Cazalas should not be recognized as a forced heir of his son's estate and be placed in possession of his rightful portion and why Mary Cazalas should not be removed as Executrix of the Estate of Albert Cazalas for her failure to administer the estate according to law and to act as a prudent administrator. In response to this rule, Mrs. Cazalas filed a peremptory exception of no right or cause of action based on her position that Francis Cazalas' action for reduction abated upon his death on August 7, 1982. Therefore, she urged the court to dismiss the actions filed on behalf of Francis Cazalas.

The trial court ruled that Francis Cazalas should be recognized as a forced heir of his son's estate and denied the request to have Mary Cazalas removed as Executrix of the Estate of Albert Cazalas. The court also overruled Mary Cazalas' exception of no right or cause of action. In recognizing the father as a forced heir, the trial court stipulated that he was only entitled to one-third of the decedent's separate property according to Civil Code Article 1494 as amended in 1979.

On appeal, the appellant, Mary Cazalas, argues that:

1. the trial court erred in denying her exception of no right or cause of action because the reduction action filed by Francis Cazalas on August 6, 1982 was a strictly personal action which abated upon his death and, therefore, Ms. Griot lacked standing to assert this action.

> 2. the laws of forced heirship in Louisiana are unconstitutional in that they violate equal protection and substantive and procedural due process as guaranteed by the 5th and 14th Amendments of the United States Constitution.

Appellant's first argument involves the interpretation of Civil Code Article 1504 which states:

> "On the death of the donor or testator, the reduction of the donation, whether inter vivos or mortis causa, can be sued for only by *forced heirs, or by their heirs* or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it."

Mrs. Cazalas interprets this article as stating that because Francis Cazalas filed his own action for reduction on August 6, 1982, his heir could not also assert this action after his death. In his reasons for judgment, the trial judge rejected Mrs. Cazalas' reasoning and stated:

> "The Court rejects the argument of Mary Cazalas that the heirs' action abated upon the death of Francis J. Cazalas. The fact that Francis J. Cazalas exercised his own rights as a forced heir in no way precludes his heirs from continuing to assert Francis J. Cazalas' rights as a forced heir and/or from asserting their own rights as heirs to a forced heir."

Additionally, Ms. Griot clearly had standing to continue Francis Cazalas' reduction action according to Code of Civil

Procedure Article 685 which states:

> "Except as otherwise provided by law, the succession representative appointed by a court of this state is the proper plaintiff to sue to enforce a right of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed.",

Therefore, we find that Mrs. Cazalas' argument is without merit and that the trial judge was correct in his ruling.

As for the appellant's argument that forced heirship is unconstitutional, the United States Supreme Court case of *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459 (1977), states that:

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance."

Article 12, Section 5 of the Louisiana Constitution clearly states:

> "Section 5. No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust."

The Louisiana legislature modified the forced heirship laws in the repeal of Article 1494 which designated ascendants as forced heirs. However, the legislature clearly specified that this repeal would only be effective for the estates of persons dying after December 31, 1981 and would not be applied retroactively.

For the reasons discussed above, we affirm the decision of the trial court. All costs are assessed to the appellant.

AFFIRMED.

APPENDIX E

THE SUPREME COURT OF THE STATE OF LOUISIANA

SUCCESSION OF ALBERT JOSEPH CAZALAS
NUMBER 84-C-1287

- - - - -

In Re: MARY WILLIAMS CAZALAS, applying for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483.

- - - - -

October 5, 1984
Denied.

JAD
PFC
WFW
JLD
FAB
JCW
HTL

Supreme Court of Louisiana
October 5, 1984

/s/ Franz Labranch, Jr.
Clerk of Court
For the Court

APPENDIX F

THE SUPREME COURT OF THE STATE OF LOUISIANA
SUCCESSION OF ALBERT JOSEPH CAZALAS
DOCKET NO. 84-C-1287

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed October 15, 1984

Notice is hereby given that Mary Williams Cazalas, as Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, and petitioner in the above captioned case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, denying her Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

/s/ Andrew G. Bucaro by Mary Williams Cazalas
ANDREW G. BUCARO
Attorney for Succession-Petitioner
6899 West End Boulevard
New Orleans, Louisiana
Telephone: 504-288-3622

/s/ Mary Williams Cazalas
MARY WILLIAMS CAZALAS
Dative Testamentary Executrix
Succession of Albert Joseph Cazalas
1116 City Park Avenue
New Orleans, Louisiana, 70119
Telephone: 504-488-0256

APPENDIX G

COURT OF APPEAL-FOURTH CIRCUIT
STATE OF LOUISIANA

SUCCESSION OF ALBERT JOSEPH CAZALAS
DOCKET NO. CA-1565

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
Filed October 15, 1984

Notice is hereby given that Mary Williams Cazalas, as Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, and petitioner in the above captioned case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, denying her Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984, in the action bearing Supreme Court Number 84-C-1287.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

/s/ Andrew G. Bucaro by Mary Williams Cazalas
ANDREW G. BUCARO
Attorney for Succession-Petitioner-Appellant
6899 West End Boulevard
New Orleans, Louisiana
Telephone: 504-288-3622

/s/ Mary Williams Cazalas
MARY WILLIAMS CAZALAS

A-17

Dative Testamentary Executrix
Succession of Albert Joseph Cazalas
1116 City Park Avenue
New Orleans, Louisiana, 70119
Telephone: 504-488-0256

APPENDIX H

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

DIVISION "D"

NUMBER 81-2483 DOCKET 1

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
Filed October 15, 1984

Notice is hereby given that Mary Williams Cazalas, as Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, and petitioner and appellant, in the above captioned case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, Number 84-C-1287, denying her Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

/s/ Andrew G. Bucaro by Mary Williams Cazalas
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/s/ Mary Williams Cazalas
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APPENDIX I

THE SUPREME COURT OF THE STATE OF LOUISIANA

SUCCESSION OF ALBERT JOSEPH CAZALAS
DOCKET NO. 84-C-1287

MOTION TO STAY EXECUTION OF THE JUDGMENT OF THE FOURTH CIRCUIT COURT OF APPEAL PENDING A TIMELY APPEAL TO THE UNITED STATES SUPREME COURT

Filed October 15, 1984

NOW INTO COURT comes Mary Williams Cazalas, Dative Testamentary Executrix for the Succession of Albert Joseph Cazalas, who respectfully represents that:

I

She has filed a timely Notice of Appeal from the denial of her Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483 on October 5, 1984, to the Supreme Court of the United States.

II

She now moves this Court to stay execution of the judgment of the Court of Appeal, Fourth Circuit, and the Civil District Court, Parish of Orleans, State of Louisiana, in accordance with Appellate Procedure Article 2166 (D) in order to prevent irreparable harm for the reasons stated in the attached memorandum in support of this motion.

WHEREFORE, Mary Williams Cazalas, as Dative Testamentary Executrix for the Succession of Albert Joseph Cazalas, moves this Court to stay execution of the judgment of the Court of Appeal, Fourth Circuit, and Civil District Court, Parish of Orleans, State of Louisiana, pending a timely appeal to the Supreme Court of the United States and until that Court rules on the appeal.

RESPECTFULLY SUBMITTED,

/s/ Andrew G. Bucaro by Mary Williams Cazalas
ANDREW G. BUCARO
Attorney For Succession-Petitioner
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New Orleans, Louisiana,
Telephone: 504-288-3622

/s/ Mary Williams Cazalas
MARY WILLIAMS CAZALAS
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Succession of Albert Joseph Cazalas
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THE SUPREME COURT OF THE STATE OF LOUISIANA

SUCCESSION OF ALBERT JOSEPH CAZALAS
DOCKET NO. 84-C-1287

ORDER

On motion of Mary Williams Cazalas, Dative Testamentary Executrix for the Succession of Albert Joseph Cazalas, and petitioner herein, and on considering her motion and the record in this matter:

IT IS HEREBY ORDERED that the motion of Mary Williams Cazalas is granted;

IT IS FURTHER ORDERED THAT execution of the judgments of the Court of Appeal, Fourth Circuit, Number CA-1565, and Civil District Court, Parish of Orleans, Number 81-2483 be and are stayed pending a timely appeal to the Supreme Court of the United States by Mary Williams Cazalas, as Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, from the judgment of this Court denying her Petition for Writ of Certiorari and Review to the Fourth Circuit Court of Appeal, Number CA-1565, from Civil District Court, Parish of Orleans, Number 81-2483, and execution is stayed until the Supreme Court of the United States rules on the appeal.

New Orleans, Louisiana, this _____ day of October, 1984.

_____

THE SUPREME COURT OF THE STATE OF LOUISIANA

SUCCESSION OF ALBERT JOSEPH CAZALAS
DOCKET NO. 84-C-1287

MEMORANDUM IN SUPPORT OF MOTION TO STAY EXECUTION OF THE JUDGMENT OF THE FOURTH CIRCUIT COURT OF APPEAL PENDING A TIMELY APPEAL TO THE UNITED STATES SUPREME COURT

The decedent, Albert Joseph Cazalas, was the son of Juanita Gonzales Cazalas and Francis Joseph Cazalas. He died testate in the City of New Orleans, Parish of Orleans, State of Louisiana, on February 8, 1981. He left a testament in olographic form dated May 8, 1964. The testament has been probated in these proceedings, and by its terms he left all of his community property and all of his separate property which he died possessed of to his wife, Mary Williams Cazalas.

The decedent did not appoint an executrix in his testament; however, his widow, Mary Williams Cazalas, was appointed administratrix on February 19, 1981. This was amended on February 22, 1982, to have her title changed to Dative Testamentary Executrix. The executrix filed a Descriptive List of Assets and Liabilities of the succession on February 19, 1981. The estate was shown to be solvent at that time. An Amended Descriptive List of Assets and Liabilities was filed on October 19, 1982, showing the succession still solvent. The First Accounting for the period February 8, 1981, to September 5, 1982, was also filed on October 19, 1982.

The decedent's mother, Juanita Gonzalas, wife of Francis Joseph Cazalas, predeceased her son on May 13, 1965. The

decedent was married twice. His first wife was Janice Mc Laughlin from whom he was divorced by judgment of the Civil District Court for the Parish of Orleans, on January 30, 1962, in proceedings No. 385-379 of the Docket of that Court. There were no children born during that marriage, and no children were adopted. The decedent was married to the executrix, Mary Williams Cazalas, and of that marriage no children were born nor adopted. The decedent was not the father of any children born during his lifetime, nor did he ever adopt anyone nor was he ever adopted by anyone. The decedent was survived by his father, Francis Joseph Cazalas.

Pursuant to Article 1494 of the Louisiana Civil Code as amended in 1979, the decedent's father became a forced heir for one-third of his son's separate property. On February 25, 1982, the decedent's father, through his attorney, Girard J. Fernandez, requested that the executrix recognize Francis Joseph Cazalas as a forced heir of his son's estate and place him in possession of his forced portion. The executrix attempted to enter into a settlement agreement with the decedent's father, but he refused. On August 6, 1982, Francis Joseph Cazalas filed a petition for reduction praying that he be placed in possession as a forced heir to an undivided interest of all the property belonging to the decedent's estate. The following day, August 7, 1982, the decedent's father died, and there was no hearing nor judgment by the court prior to his death.

On February 7, 1983, Julia C. Griot, the Dative Testamentary Executrix of the Estate of Francis Joseph Cazalas, whose succession has been opened in the Civil District Court for the Parish of Orleans in proceedings No. 82-17264, filed a Rule to Show Cause why:

1. The Administratrix in the Succession of Albert Joseph Cazalas should not file a Tableau of Distribution and an account in compliance with the requirements of the laws of the State of Louisiana;

2. Amend the Federal Estate Tax and Louisiana inheritance Tax return to report taxes due by the decedent's father as a forced heir of his son;

3. Recognize the decedent's father as a forced heir of his son and place him in possession of his undivided interest in the Estate of his son; and

4. Remove the Administratrix of the Estate of Albert Joseph Cazalas and a Dative Testamentary Executrix be appointed in her place if she fails or refuses to proceed with the administration of her husband's estate forthwith and within delays to be fixed by the court.

The estate tax was not submitted to the United States Internal Revenue Service until nine months after the death of the decedent in order to delay payment of taxes as long as possible, and also to properly prepare the returns which were complex. Because of the complexity of the succession, the audit of the succession by the Internal Revenue Service took a considerable amount of time. The final payment of the Louisiana Estate Taxes was made on March 15, 1983, after an adjustment was made in accordance with the determination of the United States Internal Revenue Service. Preparation of the accounting filed in the district court required

considerable time because of the complexity of the succession. (See Supplemental Memorandum In Support of Peremptory Exception filed March 28, 1983.)

It was the position of the executrix, Mary Williams Cazalas, that the petition for reduction filed by the decedent's father abated upon the death of the father on August 7, 1982. The pleading filed by Julia C. Griot, Dative Testamentary Executrix of the Estate of Francis Joseph Cazalas, entitled a Rule To Show Cause is in the form of a petition. Mary Williams Cazalas filed a peremptory exception of no right or cause of action and alleged that the petition should be dismissed on the grounds that the mover had no cause or right of action.

The district court rejected the argument of Mary Williams Cazalas that the action for reduction abated upon the death of Francis Joseph Cazalas in accordance with the provisions of Louisiana Code of Civil Procedure Article 428. The Court ruled that the fact that Francis Joseph Cazalas exercised his own rights as a forced heir in no way precluded his heirs from continuing to assert Francis Joseph Cazalas' right as a forced heir and/or from asserting their own rights as heirs to a forced heir. The exception of no right or cause of action filed by the executrix for the estate of Albert Joseph Cazalas was overruled.

A second issue raised by the executrix, Mary Williams Cazalas, was whether Louisiana Civil Code Articles 1494, 1502 and 1504 providing for forced heirship for parents when their children predecease them leaving no descendents are unconstitutional because they deny equal protection and substantive and procedural due process in violation of the guarantees of the Fourteenth and Fifth Amendments to the Constitution of the United States of America, and

whether they are unconstitutional as applied in this case. The court found that these articles were not unconstitutional.

Although the estate of Francis Joseph Cazalas sought a one-third reduction as to separate and community property left by testamentary disposition, the Court observed that Louisiana Civil Code Article 1494, as amended in 1979, provides for forced heirship for parents of childless children only as to separate property. Judgment was rendered placing Mary Williams Cazalas into possession of all community property. The request to have Mary Williams Cazalas removed as Dative Testamentary Executrix for alleged failure to proceed with the administration of the estate was denied.

From that judgment, Mary Williams Cazalas, as Dative Testamentary Executrix, prosecuted an appeal to the Fourth Circuit Court of Appeals. On June 7, 1984, the appellate court affirmed the judgment of the district court. From that judgment, she filed a Petition For Writ of Certiorari and Review to the Court of Appeal, Fourth Circuit, State of Louisiana. On October 5, 1984, the Louisiana Supreme Court denied her petition. On October 15, 1984, she filed a Notice of Appeal to the United States Supreme Court.

Mary Williams Cazalas, as Dative Testamentary Executrix, now moves this Court to stay the execution of the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, in accordance with the provisions of Appellate Procedure Article 2166 (D) which reads in pertinent part as follows:

> "D. If an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme

> court denies the application for certiorari. *The supreme court may stay the execution of the judgment of the court of appeal pending a timely* application for certiorari or an *appeal to the United States Supreme Court*."
> (Emphasis added.)

The basis for requesting a stay of the execution of the judgment of the appellate court is to prevent irreparable harm resulting from placement of property into the possession of heirs of Francis Joseph Cazalas that could not be recovered if the United States Supreme Court rules that the Petition for Reduction filed by Francis Joseph Cazalas abated with his death and that the Dative Testamentary Executrix of Francis Joseph Cazalas' succession has no standing in this action and/or that the Louisiana Civil Code Articles 1494, 1502 and 1504 are unconstitutional.

WHEREFORE, Mary Williams Cazalas, as Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, has filed this motion requesting that this Court stay the execution of the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, pending the timely appeal to the United States Supreme Court and a ruling by that Court.

RESPECTFULLY SUBMITTED,

/s/ Andrew G. Bucaro by Mary Williams Cazalas

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/s/ Mary Williams Cazalas
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APPENDIX J

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

CHIEF JUSTICE
JOHN A. DIXON, JR.
ASSOCIATE JUSTICES
PASCAL F. CALOGERO, JR.
WALTER F. MARCUS, JR.
JAMES L. DENNIS
FRED A. BLANCHE, JR.
JACK CROZIER WATSON
HARRY T. LEMMON
CLERK OF COURT
FRANS J. LABRANCHE, JR.

301 Loyola Ave., 70112
Telephone 504 568-5707

Filed October 17, 1984

Hon. Andrew G. Bucaro
6899 West End Blvd.
New Orleans, LA 70124

Re: No. 84-C-1287
Succession of Albert Joseph Cazalas

Dear Judge Bucaro:

This is to advise that the Court has denied your "Motion To Stay Execution Of The Judgment Of The Fourth Circuit Court Of Appeal Pending A Timely Appeal To the United States Supreme Court", filed in the above entitled matter.

With kindest regards, I remain,

Very truly yours,

Frans J. Labranche, Jr.
Clerk of Court

/s/ Dan B. Haggerty, Jr.
Dan B. Haggerty, Jr.
Deputy Clerk of Court

DBHJr/kf
ccs: Ms. Mary Williams Cazalas
Hon. Marjorie Cambre
Hon. Louis DeRosa
Hon. Dan Foley

DISTRIBUTED
JAN 25 1985

Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1040

In the Supreme Court of the United States

OCTOBER TERM, 1984

SUCCESSION OF ALBERT JOSEPH CAZALAS

On Appeal From The
Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON BEHALF OF APPELLEE TO AFFIRM

GIRARD J. FERNANDEZ,
333 St. Charles Avenue, Suite 607
New Orleans, Louisiana 70130
Telephone (504) 524-9970

ATTORNEY FOR APPELLEE,
Mrs. Julia C. Griot, Testamentary
Executrix of the Succession of
Francis Joseph Cazalas

A B Let... 3-8565
BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the laws of forced heirship of the State of Louisiana are unconstitutional under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

2. Whether an action filed by a forced heir to reduce an excessive donation mortis causa is a personal action under the provisions of Article 428 of the Louisiana Code of Civil Procedure and abates if the forced heir dies before the action can be tried.

3. Whether a succession representative (an executor) of a deceased forced heir can bring an action on behalf of his succession to reduce an excessive donation mortis causa in the will of his pre-deceased son.

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NO. 84-1040

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SUCCESSION OF ALBERT JOSEPH CAZALAS

On Appeal From The
Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON BEHALF OF APPELLEE TO AFFIRM

STATEMENT OF THE CASE

This case involves an appeal by the Executrix of the Succession of Albert Joseph Cazalas from a judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, which held that his father, Francis Joseph Cazalas was a forced heir under the laws of the State of Louisiana and entitled to one-third (⅓) of the separate property of the estate. That decision was affirmed by the Court of Appeal, Fourth Circuit, State of Louisiana and a Writ was denied by the Supreme Court of Louisiana.

The Executrix, Mrs. Mary Williams Cazalas, the wife of Albert Joseph Cazalas, had contended, and still maintains, that, by her husband's olographic will, he left both his community and separate property to her, and since he died childless, she was the universal legatee of all his property.

Francis Joseph Cazalas filed, while he was alive, an action against his son's estate, in the capacity of a forced heir, to reduce the excessive donation in his son's will by which he left his entire estate to his wife, Mrs. Mary Williams Cazalas. The father's position being that, under the laws and the Constitution of the State of Louisiana, he was a forced heir to the extent of one-third (⅓) of his son's separate property.

Before the father's action could be tried he died. His only survivors were his brother and a sister, Mrs. Julia C. Griot who was, by his will, his residuary legatee and she qualified as Executrix of his estate and filed an action on behalf of his estate against the estate of his son to reduce the excessive donation in his son's will.

Mrs. Mary Williams Cazalas contested the action taking the position that the laws of forced heirship of the State of Louisiana were violative of the Constitution of the United States, but even if the forced heir (the father) had a right to bring the action to reduce, that he died before the action could be tried and that this was a strictly personal action and abated by his death, and that the action of the Executrix of his estate had no right or cause of action to bring the action to reduce.

As noted above, the District Court, Court of Appeal and Supreme Court of Louisiana decided against Mrs. Mary Williams Cazalas and refused to stay the execution of the judgment against her. She now appeals to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Constitution of the State of Louisiana provides

for forced heirship and leaves to the Legislature the determination of the class of forced heirs and the amount of the forced portion.

Under the present law of Louisiana only children are forced heirs. Formerly, the parent of a childless married decedent, survived by a wife, was a forced heir for a one-third (⅓) portion of his son's separate property. The wife receives all of the community property and two-thirds (⅔) of her husband's separate property.

If the decedent's will, as in the case at bar, made no provision for the forced portion of his father out of his separate estate, the father can and did bring an action against his son's succession to reduce the legacies in the will by the amount of the forced portion. It is to be noted that the abolition of forced heirship for parents became effective January 1, 1982. The son had died on February 8, 1981 before the abolition, however, of forced heirship for parents.

Decedent's father, Francis Joseph Cazalas, the forced heir, died before his action to reduce could be tried so under the authority of the Civil Code of Louisiana and the Louisiana Code of Civil Procedure, the Executrix of the father, on behalf of his estate, filed an action to reduce the excessive donation in the son's will. This was proper because under the law of Louisiana the forced heir was called to his inheritance immediately at the moment of death of the deceased person from whom he succeeded, and he transmits to his own heirs his own succession and that part of his succession which he inherited from the person (his son) whom he, himself, succeeded.

The forced heir died after he filed his action to reduce

the excessive donation mortis causa in his son's will, but before it could be tried. Nonetheless his action did not abate because it was not a strictly personal action but what is known as a heritable action which could be sued for by the Executrix of his estate. This right would not extend by the law and jurisprudence to creditors of his estate.

Forced heirship is not unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. This Court has on several occasions in the past struck down as unconstitutional statutes which have deprived illegitimate children of their rights of inheritance on the ground that such statutes were discriminatory, but to our knowledge has never declared unconstitutional a State's orderly disposition of property and scheme of inheritance.

ARGUMENT

THE LAW OF LOUISIANA APPLICABLE TO FORCED HEIRSHIP OF A PARENT

On February 8, 1981, when Albert Joseph Cazalas died, Article 1494 of the Louisiana Civil Code provided as follows:

> Article 1494. Disposable portion when parents survive. Article 1494. With respect to separate property, donations inter vivos or mortis causa cannot exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both, provided that where the legal portion of the surviving father, mother, or both, is less than one-third the forced portion shall not be increased to one-third but shall remain at the legal portion.

Article 1495 of the Louisiana Civil Code provides:

> In the cases prescribed by the two last preceding articles the heirs are called forced heirs, because the donor cannot deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.

SEIZIN OF HEIRS

Upon the death of Albert Joseph Cazalas, his father, Francis Joseph Cazalas, immediately became vested with an undivided one-third (⅓) interest of his son's separate estate. This type of vestiture is known as seizin and becomes effective by operation of law. See the following articles of the Louisiana Civil Code on the subject.

> Art. 940. Seizin of heirs, intestate and testamentary.
>
> Art. 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.
>
> This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.
>
> Art. 941. Seizin by operation of law.
>
> Art. 941. The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

> Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of the right and not in fact.

Art. 942. Seizin: continuity of legal possession.

> Art. 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.

Art. 944. Seizin: transmission of succession rights to heirs of heir.

> Art. 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

In the *Succession of Coco,* 171 So. 70 (1936) the Supreme Court of Louisiana had occasion to interpret and apply the provisions of Article 944 of the Louisiana Civil Code. We quote from the opinion at Page 74 of the Southern Reporter as follows:

> All that the provisions of the codal article mean is that as the ownership of the property of the succession is vested in the heir directly and immediately upon the death of the deceased, subject to his right to accept or renounce it, in the event the heir himself should die before exercising the right, he transmits to his own heir, either as the

whole or as only a part of his own succession the property acquired by him by inheritance, with the same privilege of accepting or renouncing which he enjoyed. The transmission of the succession with its attendant rights may be effected by the heir himself in a testament executed in the form prescribed by law, or by omitting to execute a testament he may permit the transmission to be made for him by the operation of law. Civ. Code, arts. 870, 871, 875, 884, 940, 941.

In other words, the right of the heir of the heir to accept or reject the succession falling to the latter is one which, under the codal article, is transmitted to him as a part of the succession of the heir of the person who dies first and not by inheritance of the succession of that person, which had already been transmitted to his own heir. The fact that the heir of the person first deceased has not accepted or received his inheritance before his own death does not make his heir the heir of the person from whom he has inherited.

ACCEPTANCE OF SUCCESSIONS

Francis Joseph Cazalas accepted the succession of his son, Albert, when he, Francis, filed a judicial proceeding to reduce the excessive donation made by his son in his will to his wife, Mary Williams Cazalas. By the rule that he filed while he was alive on August 6, 1982 against the Executrix of his son's estate, he demanded to be put into possession of his undivided one-third (⅓) interest in his son's estate. Since the son's will left everything to his wife, the father's judicial action was an action to reduce an excessive donation mortis causa.

The Civil Code of Louisiana on acceptance of a

succession by an heir, provides that the acceptance may be either express or tacit. We quote Article 988 of the Louisiana Civil Code accordingly:

> Art. 988. Simple acceptance; express or tacit.
>
> Art. 988. The simple acceptance may be either express or tacit.
>
> It is express, when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.
>
> It is tacit, when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir.

For cases interpreting the above articles of the Civil Code of Louisiana see *Cattle Farms, Inc. vs. Abercrombie,* 211 So.(2) 354 (La.App. 4th Cir. 1968), *Truxillo vs. Truxillo,* 11 La. Ann. 412 and *Bradley vs. Union National Life Ins. Co.,* 359 So.(2) 633 (La.App. 1st Cir. 1978).

HERITABLE RIGHTS OF FRANCIS JOSEPH CAZALAS IN HIS SON'S ESTATAE

As is apparent from the Articles of the Louisiana Civil Code above quoted and referred to, Francis Joseph Cazalas became a forced heir of his son's separate estate immediately upon his son's death. The father's intention to assert his heritable rights are readily apparent from the actions he took. In the first place, he demanded from the Administratrix (now the Dative Testamentary Executrix) of his son's estate, that he be recognized as a forced heir for

one-third (⅓) of his son's estate thereby asserting that the bequest in his son's will be reduced to cover his forced protion of the estate.

When the Administratrix of his son's estae refused to recognize the father's demands as a forced heir, the father, while he was alive, filed a suit on August 6, 1982 to reduce the excessive donation in his son's will and demanded to be put in possession as a forced heir. Before this suit, in the form of a rule against the Administratrix could be tried, Mr. Cazalas, the father, died. He did everything that was available to him under the laws of forced heirship before he died. His rights and the rights of his heirs by transmission are preserved.

Article 1504 of the Louisiana Civil Code provides:

> On the death of the donor or testator, the reduction of the donation, whether inter vivos or mortis causa, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.

By his actions, while he was alive, Mr. Francis Joseph Cazalas accepted the succession of his son of which he was already seized by operation of law.

When Francis Joseph Cazalas died his interest in his son's succession became a part of his own succession along with the other assets which he owned at the time of his death. It was necessary therefore to qualify a Dative Testamentary Executrix as the representative of his estate. This was done. His sister, who is named in his will as the residuary legatee of his estate, qualified as such in

Proceedings No. 82-17264 of the docket of the Civil District Court for the Parish of Orleans, entitled Succession of Francis Joseph Cazalas.

Article 3211 of the Louisiana Code of Civil Procedure provides:

> A succession representative shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor.

The official comment of the redactors of the Code of Civil Procedure under Article 3211 reads as follows:

> (a) This article is a departure from the law relating to seizin. The utility of the concept of seizin in Louisiana law is doubtful, since as a practical matter the succession representative has full seizin of all the property of the deceased.

Article 3196 of the Louisiana Code of Civil Procedure provides:

> In the performance of his duties, a succession representative may exercise all procedural rights available to a litigant.

Article 685 of the Louisiana Code of Civil Procedure provides:

> Except as otherwise provided by law, the succession representative appointed by a court of this state is the proper plaintiff to sue to enforce a right of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or

> represented in the state or not, need not be joined as parties, whether the action is personal, real or mixed.

We quote from the official comment of the redactors of the Code under Article 685:

> In this code the succession representative, regardless of his title, represents both creditors and heir or legatees; and he has been granted powers to act for the benefit of the heirs or legatees, primarily if not exclusively. See Arts. 3198, 3211, 3221 and 3223 through 3228, *infra.*
>
> In the light of these developments the prior jurisprudence rules on the subject have become anachronistic. There is no reason today why a succession representative alone should not be able to enforce judicially all rights of the deceased, or of his succession, whether the action is personal, real or mixed. This article accomplishes this result, and the language employed is emphatic enough to indicate clearly the legislative intent to overrule all cases to the contrary.

See also 49 Tulane Law Review 1110, 33 Louisiana Law Review 199 (1973), *Estate of Richard vs. Richard,* 321 So.(2) 385 (La.App. 3rd Cir. 1975), *Jones vs. Dibert, Bancroft & Ross Ltd.,* 308 So.(2) 369 (La.App. 1st Cir. 1975), *Rice vs. Deville,* 240 So.(2) 379 (La.App. 3rd Cir. 1970), *Succession of Cuterer vs. Curtis,* 341 So.(2) 1209 (La.App. 1st Cir. 1976, *Writ refused* March 25, 1977).

HERITABLE RIGHTS DO NOT ABATE BY DEATH OF FORCED HEIR

Article 1997 of the Louisiana Civil Code provides;

> An obligation is strictly personal, when none but the obligee can enforce the performance, or when it can be enforced only against the obligor.
>
> It is inheritable when the heirs and assigns of the one party may enforce the performance against the heirs of the other.
>
> It is real when it is attached to immovable property, and passes with it into whatever hands it may come, without making the third possessor personally responsible.

The Executrix of Albert Joseph Cazalas' succession takes the position in her brief to this court that the action of Francis Joseph Cazalas to reduce the excessive donation in his son's will is a strictly personal right and that, under Article 428 of the Louisiana Code of Civil Procedure, his action to reduce the excessive donation is therefore abated by his death.

This is a fallacious argument and a misinterpretation of the Articles of both the Louisiana Civil Code and the Code of Civil Procedure.

The official comments under Article 428 of the Louisiana Code of Civil Procedure reads in part as follows:

> For the definition of strictly personal rights and obligations, see Art. 1997 of the Civil Code.

It is to be noted that the second, or middle paragraph, of Article 1997 of the Louisiana Civil Code, cited above, defines what a heritable obligation is. This definition fits exactly the provisions of Articles 942 and 944 of the Civil Code. Furthermore, it also fits in with

Article 1504 of the Civil Code which provides for the situation where a testator has made an excessive donation mortis causa and the forced heir of the testator or the heir of the forced heir of the testator brings an action to reduce the excessive donation. If such action was not heritable, how could the heir of the forced heir bring the action?

To the above effect also see *Bogart vs. Caldwell*, 66 So.(2) 629 (App. 1953), which holds that an "heritable obligation" is one from which there arises the righs of heirs of one party to enforce performance against the heirs of the other party.

Article 2315 of the Louisiana Civil Code with regard to survival of actions for damages and the jurisprudence under this article is not applicable to the issues in the case at bar and, therefore, we will not even discuss the article nor the cases under it.

The articles of the Civil Code and the jurisprudence which we cited above under Heritable Rights of Forced Heirs, and Article 1997 of the Louisiana Civil Code are controlling of the issues before this Court.

Appellant cites in her brief *Succession of Henican*, 248 So.(2) C.App. 4th Cir. (1971) and *Thompkins vs. Prentice*, 12 La. Ann. 465 (1857) as authority for her contention that the right to sue for a reduction of an excessive donation is a personal right and abates upon the death of the party who brings the action. These two decisions are not applicable to the case at bar because they involve suits by creditors of the debtor-forced heir who had not accepted the succession or filed an action to reduce an excessive donation mortis causa.

In the case at bar the forced heir (the father) filed an action while he was still alive to reduce an excessive donation mortis causa in his son's will. This was a personal action and not a suit by one of his creditors. Furthermore, his suit was a judicial acceptance of the forced portion due him from his son's estate.

The *Thompkins* and the *Henican* cases are in fact supportive of Appellee's position in the case at bar as will be noted from the following quotation in the *Henican* case at Page 388 of the opinion in the Southern Reporter:

> After a careful review of the jurisprudence of the state, we find that the Thompkins case has not been modified by subsequent legislation or jurisprudence and that the principle of law enunciated therein is dispositive of the case at bar. This court is aware of the fact that under the French Code Napoleon the result of this matter would be different—that a creditor would have the right to assert the action to reduce a legacy if his debtor refused to do so. However, the law of the state of Louisiana on this matter differs from the French. As was stated in Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175 (1900):
>
> (The legislature) framed the law by which we are governed in language which expressly authorizes the bringing of the action to reduce the donations of the testator within the disposable quantum 'by forced heirs, or by their heirs or assigns.' Rev.Civ.Code, art. 1504, and in this respect the Civil Code differs also from the Code Napoleon, which authorizes the bringing of such action by the forced heirs, or 'par leurs heritiers ou ayants cause'; the term 'ayants cause' including creditors, a class not necessarily included in the term 'assigns.' Code Nap. art. 921; Fuzier-

> Hermann, vol. 11, p. 526, No. 11; Rev.Civ.Code, art. 3556, verbo 'Assigns'; Thompkins v. Prentice, 12 La.Ann. 465. We have no authority, then, to exclude collateral heirs from the right here claimed because they were excluded by the Spanish law, nor to include creditors because they are included under the French law.
>
> Accordingly, unless and until the legislature sees fit to make the appropriate changes, the creditor of a forced heir has no right to assert the right of reduction of a legacy absent a specific assignment from the debtor.

CONSTITUTIONALITY OF FORCED HEIRSHIP IN LOUISIANA

Article 12, Section 5 of the Louisiana Constitution of 1974 states:

> Section 5. No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust.

At the time of the death of Albert Joseph Cazalas on February 8, 1981, Article 1494 of the Louisiana Civil Code provided as follows:

> With respect to separate property, donations inter vivos or mortis causa cannot exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both, provided that where the legal portion of the surviving father, mother, or both is less than one-third the forced portion shall not be increased to one-third but shall remain at the legal portion.

Article 1494 was repealed effective January 1, 1982 so that now only children are forced heirs.

Appellant has requested this Court to declare the laws of forced heirship of Louisiana unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. If this Court acceeded to her request the effect would be not only to wipe out the law of forced heirship as it pertained to her husband's father at the time of her husband's death, but to wipe out the laws of forced heirship for all children. This would have a devastating effect upon the orderly disposition of property and the statutory scheme of inheritance of the State of Louisiana.

Under Article 1493 of the Louisiana Civil Code which we quote below, it may readily be observed that a testator or disposer has a great deal of freedom to dispose of his estate. The restrictions on dispositions are applied to children only and are minimal:

> Donations inter vivos or mortis causa cannot exceed three-fourths of the property of the disposer, if he leaves, at his decease, one child; and one-half, if he leaves two or more children.
>
> Under the name of children are included descendents of whatever degree they be, it being understood that they are only counted for the child they represent.

Louisiana is the only state in the Union which has provisions in its constitution and laws for forced heirship on a limited basis. These provisions with regard to descent and distribution, are based upon the historical and traditional influence of the French, Spanish and Roman laws. Louisiana has been referred to since 1808 as a Civil Law State.

Louisiana is also one of the few states which has a community property system which affects the property and inheritance rights of its people.

To our knowledge neither the community property system nor the laws of forced heirship have ever been declared unconstitutional by this Court except in those instances pertaining to the inheritance rights of illegitimate children and the holding of the decisions was on the grounds of discrimination.

In *Trimble vs. Gordon et al,* 430 U.S. 762 (1977), the issue was the constitutionality of Sec. 12 of the Illinois Probate Act which allowed illegitimate children to inherit by intestate succession only from their mother, while legitimate children were allowed to inherit from both their mother and father.

The question was whether Sec. 12 violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of illegitimacy and sex.

This Court concluded that the stautory discrimination against illegitimate children was unconstitutional and noted that it was the twelfth time since 1968 that the Court considered the constitutionality of alleged discrimination on the basis of illegitimacy. Some of the cases referred to and citaed in the opinion arose from the State of Louisiana.

The *Trimble* case turned strictly on the question of discrimination not upon a State's orderly disposition of property and statutory scheme of inheritance. To that effect we quote from the Court's opinion at Page 771 of the U.S. Reporter as follows:

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the Federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

We urge this Court to uphold the constitutionality of the laws of forced heirship of the State of Louisiana.

CONCLUSION

It is respectfully submitted that judgment should be rendered in favor of Appellee and that this Court should rule that:

1. The judgment of the Supreme Court of Louisiana which affirmed the judgments of the Court of Appeal, Fourth Circuit, State of Louisiana, and the Civil District Court for the Parish of Orleans, State of Louisiana, be affirmed.

2. The laws of forced heirship of the State of Louisiana do not violate the Constitution of the United States of America, particularly the Fifth and Fourteenth Amendments thereof.

3. Francis Joseph Cazalas was a forced heir of his son, Albert Joseph Cazalas and that he, the father, while alive and following his death the legatees under the

provisions of his will, are entitled to one-third (⅓) of all the separate property belonging to the estate of Albert Joseph Cazalas.

Respectfully submitted,

_____

Girard J. Fernandez

CERTIFICATE OF SERVICE

I, Girard J. Fernandez, Attorney for Appellee herein, Mrs. Julia C. Griot, Dative Testamentary Executrix of the Succession of Francis Joseph Cazalas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 2, 1985 I was served with a copy of Appellant's brief. I hereby further certify that on the 24th day of January, 1985, I served copies of Appellee's brief herein by depositing three copies in a United States Post Office with first class postage pre-paid, certified, return receipt requested, on all parties required to be served as follows:

1. Mary Williams Cazalas, Attorney for and Dative Testamentary Executrix of the Succession of Albert Joseph Cazalas, addressed to Mary Williams Cazalas, 1116 City Park Avenue, New Orleans, Louisiana, 70119.

2. Honorable William J. Guste, Attorney General of the State of Louisiana, addressed to Honorable William J. Guste, Attorney General of the State of Louisiana, 234 Loyola Avenue, New Orleans, Louisiana 70112.

3. Andrew G. Bucaro, Attorney For The Succession-Appellant, addressed to Andrew G. Bucaro, 6899 West End Boulevard, New Orleans, Louisiana, 70124.

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